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Brazilian Court Dismisses Claim on Grounds of the Existence of an Arbitration Agreement under the New Brazilian Civil Procedure Code

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On 22 September 2016, the 1st Instance Court of Jundiaí – São Paulo dismissed a claim under Article 485, VII of the New Brazilian Civil Procedure Code (NBCPC) finding that the court lacked jurisdiction over disputes arising out of a distribution agreement which provided for disputes to be resolved by arbitration. Pursuant to Article 485, VII "The judge will not decide on the merits when: VII – he/she recognizes the existence of arbitration agreement, or when the arbitral tribunal accepts its jurisdiction".

Of interest was the fact that the Court permitted the jurisdictional argument to be deployed before the filing of the defense. Previously a lack of jurisdiction argument had to be deployed in the statement of defense, which meant that the respondent had to incur the costs and inconvenience of pleading its defense in full, before the Court determined the issue of jurisdiction.

Background

The claimant, Commat Comércio de Máquinas Ltda, commenced proceedings in the Brazilian courts against the respondents, Crown Equipment Corporation and Crown Comércio de Empilhadeiras Ltda., seeking damages for the respondents' bad faith conduct following termination of a distribution agreement (the Agreement).

Prior to submitting the statement of defense, the respondents applied for the claim to be dismissed, on the basis that the Agreement provided for ICC arbitration, seated in Miami (but reserving their rights to submit a defense). The respondents conduct was, on its face, contrary to Article 337, X of the NBCPC which provides that such jurisdictional issues are to be raised, prior to the merits stage, (but) in the statement of defense ("Art 337: Before discussing the merits, the Respondent shall argue: X – the existence of an arbitration agreement").

In its application, the respondents contended that:
(i) such application was comparable to a "Challenge of Pre-enforcement" (i.e. *Exceção de Pré-executividade*: an application made by the debtor – before discussing the merits – which only covers objective matters, aimed at dismissing the enforcement proceedings, before the merits' analysis);

(ii) the existence of an arbitration agreement shall be raised at the first opportunity, complying with

the procedural effectiveness and economy principles;

(iii) the Brazilian Superior Court of Justice has already validated and accepted a similar application (see STJ – REsp no 1465535/SP, published on 22 October 2016); and

(iv) the Study Centre of the Brazilian Federal Justice had also expressed a similar view ("The [existence] of an arbitration agreement may be informed [to the court] by means of a simple petition, at any moment prior to the submission of the statement of defense, without the precluding from its rights to the merits defense; the judge may then suspend the proceedings until final decision of this matter" (22-23 August 2016)).

In turn, the claimant challenged the application arguing that:

(i) the claim concerned facts and acts experienced after the termination of the Agreement, and for this reason the dispute should not be submitted to arbitration ;

(ii) the arbitration clause was not binding, because one cannot deny the parties access to justice ;

(iii) the Agreement was an adhesion contract, and therefore the arbitration clause should have been emphasized and expressly accepted by the claimant;

(iv) referring the dispute to arbitration, would require subsequent recognition of the award by the STJ, which is contrary to the principles of procedural effectiveness.

Interestingly, with regards to item (ii), the claimant based its application on a recent judgment of the São Paulo Court of Appeals (TJSP), ruling that:

> The parties have the freedom for choosing the method of dispute resolution, which results in the possibility of choosing for arbitration (…)
>
> However, the parties are not restricted to the arbitration, [they] may opt to refer the problems relating to the contract to the common justice. Actually, it is not possible to exclude the possibility of submitting the dispute to the Judiciary, solely based on the existence of an arbitration agreement. (TJSP – Appeal no 1110126-72.2015.8.26.0100, tried on 6 September 2016)

Following the parties' applications, the Jundiaí judge decided:

> With regards to the Challenge of Jurisdiction submitted prior to the statement of defense, I do not see any procedural fault.
>
> According to the principles of procedural effectiveness and good faith, it is desirable the parties argue the existence of an arbitration agreement at the first opportunity in order to avoid the continuance of the proceedings before an incompetent court.

The claimant applied for a motion for clarification of the decision dismissing the claim. On 19 October 2016, The 1st Instance Court of Jundiaí rejected the claimant's motion. The decision is

still subject to further rights of appeal to the TJSP. The decision was published on 4 November 2016.

Analysis

The NBCPC came into force in March 2015, importantly supporting arbitration in Brazil, specifically providing that court proceedings should be dismissed – without a merit analysis – where there is an arbitration agreement, and/or when an arbitral tribunal has recognized its jurisdiction.

However, the Article 337, X of NBCPC provides that the court will be informed of the existence of an arbitration agreement in the statement of defense. In fact, this imposes on the respondent the costs of producing a merits defense, and revealing its arguments to its opponent which may not be in the respondents interests should the claim then be dismissed in favor of arbitration.

There can be no doubt that the TJSP judgment relied upon by the claimant (stating that arbitration agreement is not binding), is an unorthodox view of the Brazilian Courts' decision which have constantly and strongly supported arbitration. We respectfully submit that the 1st Instance Court of Jundiaí applied the correct and common understanding of the law as previously decided by the STJ and recommended by the Study Centre of the Brazilian Federal Court.

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